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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH R. CACERES, Defendant and Appellant.	B206612 (Los Angeles County Super. Ct. No. BA325485)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Reversed in part; affirmed in part.

Robert H. Pourvali, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Joseph R. Caceres of two counts of criminal threats. On appeal, defendant contends there is insufficient evidence to support the judgment as to the count involving victim Elsie Vasquez. He also contends that instructional error requires a reversal. We agree that the evidence is insufficient to support defendant's conviction for criminal threats against Vasquez. But we disagree that there was any instructional error. We therefore reverse the judgment as to count 2 concerning Vasquez, but we otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Criminal threats against Kelly Merino and Elsie Vasquez.*

1. Prosecution case.

Kelly Merino met defendant in June 2007. They were getting to know each other, and sometimes she, defendant and another friend would do methamphetamine together. On June 22, 2007, defendant called Merino and asked her to give him a ride. The next day, June 23, defendant showed up at Merino's house around 4:30 a.m. She was in her car with a friend, whom Merino was driving to work. Merino told defendant not to get into the car, but he got into the backseat. Placing his hands on Merino's shoulders, he told her to drive and not to say anything. He said he was coming along because he had somewhere to go. He also asked Merino if she was planning to leave him. Merino and defendant dropped off her friend at work. Merino told defendant she needed to return home to her two children. But he told her, " 'You're going to take me because I need to go.' " Defendant's tone frightened Merino. He snatched the keys out of the ignition.

Although defendant had told Merino they were not going back to her home, she drove in that direction. About two blocks from her home, Merino stopped the car, got out and started to walk home. Defendant walked up behind her, snatched the car keys, and repeated that he wanted her to drive him somewhere. She refused again. Defendant left

in Merino's car. At some point during these events, defendant pulled her hair. Defendant also told Merino he would kill her if she called the cops. She was afraid she would not see her girls again. She was also afraid because he was a gang member.

Merino went to see defendant's father. He told her not to worry. He would bring the car back to her.

Crying, Merino called Elsie Vasquez, a friend and her pastor's wife. Merino told Vasquez that defendant had pulled her out of her car, taken it and threatened her. Vasquez and Merino, with Merino's two children, drove to defendant's house. Merino's car was parked there. Leaving Merino in the car, Vasquez went to talk to defendant. When she asked for Merino's car keys, defendant gave them to her. But when Vasquez told defendant she was Merino's friend and pastor, he got upset and grabbed the keys back. He swore at Vasquez, using the words "fuck" and "bitch." Defendant told her to get out of there.

Scared, Vasquez walked back to the car. Defendant drove by in a car. Upon seeing Merino, he told her he would kill and rape her. He told Vasquez she had disrespected his house; she was a disgrace to her race; and " 'I could have [shot] you. You could have been dead . . . .' " " 'I don't know why you're not dead,' " which Vasquez took as a threat to her physical safety.[1] Vasquez replied that God would take care of her. Defendant asked Merino why the hell she'd brought Vasquez to his home and asked if she wanted to be killed. Defendant put his hand on the window where Merino was sitting and tried to open the door. Vasquez told defendant to take his hand away. Defendant told Merino's daughters, who were in the backseat of the car, that Merino was a bad mother and he was going to take them with him because he had a nice pool.

[1] It is not clear whether defendant told Vasquez that he could have shot her and she could have been dead first when she came to his door and repeated it later at the car.

Merino asked defendant to give back her car. He said he was going to use it. When Merino threatened to call the police, defendant said he would "kick [her] ass." Merino also testified that defendant told Vasquez he would "chop her head off and put it in between her legs," but Vasquez testified that defendant did not say this. Nor did defendant, according to Vasquez, say, " 'I'm going to kill you' " to her.

Merino and Vasquez left. About three hours later, defendant had not returned Merino's car. She called 911. She told the operator her car had just been stolen and that her daughters had been in the car with her. At trial, Merino admitted she lied to the operator.

2. Defense case

Claudia Ramos, the sister of Merino's ex-boyfriend, testified that Merino often lied to her about giving her a ride to work. Ramos told a private investigator for defendant that Merino is a compulsive liar. Merino has lied about other people in the past.

Merino told a police officer who responded to the 911 call that defendant grabbed her by the back of the hair, yanked her head as she drove and threatened to kill her.

Jose Caceres, defendant's father, testified that on June 23, 2007, Merino came to his house between 6:30 and 7:00 a.m. She said defendant had her car and she needed it back. Caceres assured Merino defendant would return her car. Merino stayed for about 10 minutes, but she never mentioned that defendant had threatened her. The next day, defendant told his father he was taking the car to Merino, but that he had dented it. Caceres and Merino tried to find the car where defendant said he had left it, but they were unable to locate it. Caceres therefore lent his car to Merino. Although he asked her to return it, she didn't. Caceres also gave Merino $200 to get the car out of impound. Caceres continued to give Merino money thereafter to help her with rent.

Detective John Hurd interviewed Merino on June 25, 2007. Merino told the detective that defendant approached her at 5:15 a.m. on June 23 and said he would kill

her if she didn't go with him. She grabbed her keys and walked away, but defendant grabbed the keys from her. Merino did not tell Detective Hurd that defendant said he would kill her if she called the cops at that time. Defendant did, however, say he would kill her if she called the cops after Merino and Vasquez went to defendant's house to get her car back. She told the detective that defendant threatened to kill her for bringing Vasquez to his home. The detective did not recall Merino telling him defendant said he would kick her ass, rape her or kill her if she didn't get off her car or " 'I'm going to kill you if you don't give me your car.' "

Merino told the detective defendant threatened to chop off Vasquez's head and put it between her legs, but Vasquez, whom the detective also interviewed, said she never heard defendant say that. Vasquez confirmed that Merino told her defendant grabbed her by the hair because she wouldn't give him her car. After Vasquez knocked on defendant's door, he told her, " 'How dare you knock on my door, you could be dead.' " Vasquez replied that she was going to call the police and then they would see who was going to be dead. Detective Hurd did not write in his police report that defendant told Vasquez, " 'I could have killed you.' "

II. Procedural background.

Trial was by jury. On February 29, 2008, the jury found defendant guilty of count 1, criminal threats against Merino (Pen. Code, § 422)[2] and of count 2, criminal threats against Vasquez. On March 14, the trial court sentenced defendant to the upper term of three years on count 1, doubled to six years based on a prior strike allegation that defendant admitted. The court sentenced him to a five-year term under section 667, subdivision (a). As to count 2, the court sentenced defendant to a concurrent two years, doubled to four years.

[2] All further undesignated statutory references are to the Penal Code.

DISCUSSION

I. There is insufficient evidence to support defendant's conviction for criminal threats against Elsie Vasquez.

Defendant contends there is insufficient evidence he criminally threatened Elsie Vasquez. We agree.

To determine if there is sufficient evidence to support a conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] ' "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; see also *In re George T.* (2004) 33 Cal.4th 620, 630-631.)

A defendant may be found guilty of making a criminal threat when there is substantial evidence that (1) the defendant willfully threatened to commit a crime that could result in another's death or great bodily injury; (2) defendant specifically intended the statement be taken as a threat (notwithstanding that the defendant might not have intended to carry out the threat); (3) the threat, on its face and under the circumstances made, is so unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution; (4) the threat caused the victim to suffer sustained fear for his or her safety; and (5) the fear was reasonable under the circumstances. (§ 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) We evaluate the totality of the circumstances to determine whether the communication conveyed to the victim a gravity of purpose and an immediate prospect of execution of the threat. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859-863; *People v. Butler* (2000) 85 Cal.App.4th 745, 753-754; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136 [threats are judged in their context].)

Here, defendant said to Vasquez, "I could have [shot] you. You could have been dead."[3] The question is whether this statement or threat, on its face and under the circumstances made, was so unequivocal, unconditional, immediate, and specific as to convey to Vasquez a gravity of purpose and immediate prospect of execution. The use of the word " ' so' " indicates that unequivocality, unconditionality, immediacy and specificity " 'must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 339, 340.) Defendant's statement cannot be characterized as "so" unequivocal, unconditional, immediate or specific. The statement is not like, for example, the unambiguous and unconditional threat left on the victims' answering machine in *People v. Solis* (2001) 90 Cal.App.4th 1002, 1009—"I'm coming for you. You're going to die. . . I'm going to kill you." In contrast, defendant's statement here is vague and ambiguous, failing to convey that something harmful would befall Vasquez.

The People, however, suggest that the threat was a conditional one that, nonetheless, constitutes a criminal threat. A conditional threat communicates to the victim that a violent act will occur unless something that is ostensibly under the victim's control occurs. (See, e.g., *People v. Brooks* (1994) 26 Cal.App.4th 142, 144 [" ' "If you go to court and testify, I'll kill you" ' " was a criminal threat]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152 [grammatically conditional statements can fall under section 422].) Defendant's statement cannot be characterized as a conditional one. He did not, for example, say, "If you don't leave now I will kill you." In fact, his comment did not refer to any future conduct on his behalf. If anything, his comment referred to the past or to what could have happened.

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[3] We note that the statement "I'm going to chop your head off and put it in between your legs" cannot be the basis of the crime, nor do the People so argue. Although Merino testified that defendant made this statement to Vasquez, Vasquez denied hearing defendant make this statement. If Vasquez never heard defendant make the statement, she could not have been put in sustained fear because of it.

This case thus is closer to *In re Ricky T., supra,* 87 Cal.App.4th 1132. In *Ricky T.*, the defendant, after briefly leaving his high school classroom, returned to find the door locked. His teacher opened the door, which hit defendant's head. Defendant said, " 'I'm going to get you.' " (*Id.* at p. 1135.) The Court of Appeal found that this threat "lack[ed] credibility as indications of serious, deliberate statements of purpose," and it was "ambiguous on its face and no more than a vague threat of retaliation without prospect of execution." (*Id.* at pp. 1137-1138.) Here, too, defendant's comment was ambiguous and vague, the result of an emotional outburst. Such "angry utterances or ranting soliloquies, however violent" do not violate section 422. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.) Defendant's comment and conduct toward Vasquez are not to be condoned; nevertheless, his comment does not rise to the level of a criminal threat under section 422.

II. Jury instructions.

Defendant next takes issue with the way in which the trial court instructed the jury on criminal threats. The jury was instructed: "The defendant is charged in counts 1 and 2 with having made a criminal threat, . . . [¶] To prove that the defendant is guilty of this crime, the People must prove the following six elements: [¶] 1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Kelly Merino, as to count 1, and Elsie Vasquez, as to count 2; [¶] 2. The defendant made [a] threat to Kelly Merino and Elsie Vasquez orally; [¶] 3. The defendant intended that his statement be understood as a threat; [¶] 4. The threat was so clear, immediate, unconditional and specific that it communicated to Kelly Merino and Elsie Vasquez a serious intention and the immediate prospect that the threat would be carried out; [¶] 5. The threat actually caused Kelly Merino and Elsie Vasquez to be in sustained fear for her own safety or for the safety of her immediate family; [¶] 6. Kelly Merino's and Elsie Vasquez['s] fear was reasonable under the circumstances."

Because the court referred to both Merino and Vasquez in the instruction, defendant contends that the jury was permitted to convict him "even if it only found that he made a threat to Ms. Merino and that *that specific threat* caused Ms. Vasquez to be in

sustained fear." In other words, if Vasquez was in sustained fear because of a threat not directed to her but to Merino, the jury might have mistakenly convicted defendant of making a criminal threat to Vasquez. We do not agree.

"In assessing whether the jury instructions given were erroneous, the reviewing court ' " 'must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" ' [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148-1149.) Considering the jury instructions given as a whole requires us to reject defendant's contention of error. The instruction defendant challenges states there are *two* counts, one involving Kelly Merino and the second involving Elsie Vasquez. Moreover, the jury was separately instructed that "count 1" was "criminal threats against Kelly Merino" and "count 2" was "criminal threats against Elsie Vasquez." The jury was also told, "You must decide each charge separately" and "[e]ach of the two counts charged in this case is a separate crime, and you must consider each count separately and return a separate verdict for each one." During her closing argument, the prosecutor told the jury that "defendant has to personally intend *as to each woman* to threaten her and to put her in fear." (Italics added.) She told them to pick the threat "that you believe was proven beyond a reasonable doubt *as to Kelly Merino* and one that you believe was proven beyond a reasonable doubt *as to Elsie Vasquez*." (Italics added.)

We therefore conclude that there is no reasonable likelihood that the jury interpreted the instruction in the manner defendant suggests.

DISPOSITION

The judgment is reversed as to count 2, criminal threats against Elsie Vasquez. The judgment is otherwise affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.